Supreme Court, U.S.
FILED

97-1862 MAR 2 1998

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No. _____

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1997

Lionel Dela Rosa, *Petitioner,*

v.

Scottsdale Memorial Health Systems, Inc., *et al., Respondents.*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 1997

60 pp

QUESTIONS PRESENTED

1) Whether the Petitioner, as the non-moving party, was entitled to have the District Court and the Ninth Circuit view the evidence and inferences that may have been drawn from the evidence set forth in connection with Respondent's motion for summary judgment filed in the District Court in the light most favorable to Petitioner and thus avoid summary judgment.

2) Whether the Petitioner, who established in the District Court a prima facie case of hostile environment and disparate treatment race and age discrimination and submitted additional evidence showing he was subject to a racial joke, intentional physical injury from a chemical burn, poisoning, workplace sabotage, and personal property damage created an inference of discriminatory animus sufficient to avoid summary judgment on his discrimination claims.

3) Whether the Petitioner, who established in the District Court that he took protected activity (by filing an internal grievance of race discrimination) and subsequently received an adverse performance appraisal was illegally retaliated against and therefore should survive summary judgment on his retaliation claim.

4) Whether the Petitioner was entitled to survive summary judgment on his state law claims in light of the facts and evidence submitted in connection with Respondents' motion for summary judgment.

BEST AVAILABLE COPY

LIST OF PARTIES

Lionel Dela Rosa, *Petitioner*.

Scottsdale Memorial Health Systems, Inc., An Arizona Corporation; Michael Johnston and Jane Doe Johnston, husband and wife; Todd Lyon and Jane Doe Lyon, husband and wife, *Respondents*.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1997

Lionel Dela Rosa, *Petitioner,*

v.

Scottsdale Memorial Health Systems, Inc., *et al., Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Lionel Dela Rosa respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The memorandum opinion of the court of appeals (App., *infra,* A-1--A-8) was designated as "not appropriate for publication". The opinion of the district court (App., *infra,* B-1--B-18) is unreported.

JURISDICTION

The Court of appeals entered its judgment on December 2,

1997. (App., *infra*, A-1). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. §2000e

STATEMENT

Petitioner, Lionel Dela Rosa, a sixty-one year old Hispanic male, on July 29, 1994, filed a nine count complaint against his employer at that time, Respondent Scottsdale Memorial Health Systems Inc. (hereinafter "SMH"); against his immediate supervisor, Respondent Michael Johnston, *et ux.*; and against a coworker, Respondent Todd Lyon, *et ux.* Mr. Dela Rosa's complaint alleged race discrimination; age discrimination; retaliation; breach of contract; breach of the covenant of good faith and fair dealing; battery; interference with contract; negligent supervision; and intentional infliction of emotional distress. Respondents removed the case to federal district court pursuant to 42 U.S.C. §1981, based upon the alleged violations of Title VII of the 1964 Civil Right Act (42 U.S.C. §2000-e), as amended (42 U.S.C §1981); and pursuant to 29 U.S.C. §633(b), based upon the alleged violations of the Age

Discrimination in Employment Act.

On August 12, 1994, after Mr. Dela Rosa was allegedly constructively discharged from his employment with Respondent SMH, he amended his complaint to include a wrongful constructive discharge claim.

On December 11, 1995, Respondents contemporaneous with filing their motion for summary judgment, filed a motion to exceed page limitations by an additional eight pages for their summary judgment motion as they were seeking dismissal of all ten of Petitioner's claims and argued that they could not meaningfully respond without exceeding the fifteen page limit. The District Court granted Respondents' motion to exceed page limitations by eight pages.

Mr. Dela Rosa argued that he could not meaningfully respond to Respondent's twenty-three page motion for summary judgment without exceeding the fifteen page limit and moved the District Court to exceed page limits by the same number of pages as Appellee/Defendants, but the District Court allowed Mr. Dela Rosa only an additional three pages for his response.

On September 20, 1996, the District Court granted Respondents' motion for summary judgment in its entirety and dismissed all ten of Mr. Dela Rosa's claims. On October 18, 1996, a timely Notice of Appeal to the United States Court of Appeals For the Ninth Circuit of the District Court's Order granting summary judgment to Respondents and dismissing Mr. Dela Rosa's case was filed by Mr. Dela Rosa.

After the appeal was fully briefed and argued, in it's decision filed December 2, 1997, the United States Court of Appeals For the Ninth Circuit affirmed the District Court's order granting summary judgment to Respondents.

On March 2, 1998, a timely Petition for a Writ of Certiorari to the United States Supreme Court was filed by Mr. Dela Rosa.

RELEVANT UNDERLYING FACTS

Petitioner Lionel Dela Rosa is a 61 year old Hispanic man who served this country during the Vietnam War and is a decorated combat veteran, having been awarded the Bronze Star for exhibiting uncommon valor while under enemy fire. From April 9, 1990 to August 10, 1994, Mr. Dela Rosa worked as a Biomedical

Engineering Technician II (hereinafter "BMET II") at Respondent Scottsdale Memorial Hospital (hereinafter "SMH").

As a BMET II FOR SMH, Mr. Dela Rosa received exemplary performance appraisals for his job performance on May 9, 1990; June 26, 1991; and June 25, 1992. Despite his excellent work performance, Mr. Dela Rosa became the victim of discrimination and racially and/or age motivated harassment while working at SMH. The incidents of discrimination and racially motivated practical jokes began in 1992 when Mr. Dela Rosa's white coworker, Respondent Todd Lyon, intentionally inflicted a chemical burn on Mr. Dela Rosa by pressing a freon type canister against Mr. Dela Rosa's back and releasing its contents. This chemical burn required Mr. Dela Rosa to seek emergency room treatment, and caused a permanent scar on Mr. Dela Rosa's back. Shortly following the chemical burn incident, Mr. Dela Rosa discovered that bottles of hazardous chemicals located above his work bench had been deliberately glued to the shelf. When Mr. Dela Rosa reached up to take a bottle of Simple Green from the shelf, the bottom fell out of the bottle due to a chemical reaction between the glue and the plastic

bottle. As a result, this powerful cleaning solvent spilled on Mr. Dela Rosa's workbench, the equipment he was working on, and the floor. Later in 1992, while Mr. Dela Rosa was away from his work bench, someone in the work area contaminated the coffee in his cup with an unknown substance. Before realizing his coffee had been poisoned, Mr. Dela Rosa swallowed a large sip of coffee which immediately made his throat burn and caused him to vomit. Mr. Dela Rosa then smelled the coffee, and noted that the foreign substance which contaminated his coffee had an odor similar to garbage. Since drinking the contaminated coffee, Mr. Dela Rosa has experienced continual gastro-intestinal problems resulting in frequent reflux reactions.

During 1993, a more obvious pattern of discrimination began to develop and increase in frequency. In January 1993, Mr. Dela Rosa's workmanship and technical proficiency was criticized in front of other coworkers by Respondent Todd Lyon, a white younger man, when Mr. Lyon referred to Mr. Dela Rosa as "a stupid idiot." Shortly thereafter, another incident occurred in front of coworkers when a white coworker, encouraged by Mr. Dela Rosa's immediate

supervisor, Respondent Michael Johnston, told a racist joke which disparaged and advocated the killing of Hispanics.[1] After telling the joke, Respondent Johnston and the joke-telling employee looked at Mr. Dela Rosa to see his reaction and then left giggling.

Other incidents that occurred during 1993 and 1994 included Mr. Dela Rosa discovering that his work bench had been loosened from its supports so that it would fall when anything of substantial weight was placed upon it;[2] in SMH's parking lot, Mr. Dela Rosa

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1. The racial joke went as follows: There was an Arizonan, a Russian, and a Mexican in the desert. The Russian took out a bottle of vodka and took a big swig, then threw the bottle into the air and shot it. The Arizonan asked why he did that, and the Russian replied, "we have so much vodka in Russia we just take one swig and get rid of the bottle." Then the Mexican took out a bottle of tequila, took a big swig and threw the bottle into the air and shot it. When the Arizonan asked him why he did that, the Mexican replied, "we have so much tequila in Mexico we just take one swig and get rid of the bottle." The Arizonan then took out a bottle of whiskey, took a big swig and shot the Mexican. When the Russian asked him why he did that, the Arizonan replied, "We have too many Mexicans in Arizona and we would rather shoot the Mexicans than waste the whiskey."

2. Mr. Dela Rosa narrowly escaped serious injury when his work bench gave way under light pressure. Had something

found on numerous occasions wooden golf tees propped under his tires in such a manner that they could have punctured his tires had he not discovered them before he drove over them; and on other occasions, Mr.. Dela Rosa found that someone had deliberately deflated his car's tires.

Despite the fact that Mr. Dela Rosa repeatedly reported these incident of harassment and discrimination to Respondent SMH, no remedial or disciplinary action was taken against the perpetrators. The Respondent SMH did not investigate or reprimand anyone related to the incidents of harassment and discrimination. Instead, Respondent SMH chose to counsel Mr. Dela Rosa for an alleged lack of interpersonal communication skills. On June 1, 1993, following a hostile confrontation between himself and Respondent Todd Lyon, Mr. Dela Rosa was prompted to file an internal grievance with the Respondent SMH in which Mr. Dela Rosa made allegations that he was being discriminated against and harassed because of his race and age.. In that incident, Respondent Lyon attempted to embarrass Mr.

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heavy been placed on the bench, it would have certainly collapsed and could have seriously injured Mr. Dela Rosa or others in the area.

Dela Rosa's professional reputation by contacting a technician from another hospital to describe Mr. Dela Rosa's difficulty in repairing some equipment. When Mr. Dela Rosa objected, the much younger Respondent Lyon became threatening. The grievance was filed by Mr. Dela Rosa when his supervisor , Respondent Michael Johnston, issued a written performance warning only to Mr. Dela Rosa, and did not give Respondent Lyon a reprimand or verbal counseling. This grievance by Mr. Dela Rosa put Respondent SMH on notice that there had occurred and was ongoing race and age discrimination in the workplace.

The grievance eventually found its way to Respondent SMH's Director John Zolinski. Mr. Zolinski after investigating the incident, conceded that Respondent Lyon had acted inappropriately by embarrassing Mr. Dela Rosa on the subject occasion, but Mr. Zolinski diminished the seriousness of the incidents of racial and age harassment by referring to them as "horseplay".

Still seeking redress for his complaints of discrimination, Mr. Dela Rosa appealed the decision of the initial June 1, 1993 grievance to Respondent SMH's Administrator Thomas Sadvary. Mr. Sadvary

withdrew the written reprimand that was placed in Mr. Dela Rosa's file stemming from the confrontation with Respondent Lyon. Mr. Sadvary's decision to withdraw the reprimand was based on his determination that Respondent Johnston had failed to conduct a thorough investigation of the incident.

On June 30, 1993, unable to get satisfaction through SMH's internal grievance system, Mr. Dela Rosa filed a charge of discrimination against Respondent SMH with the Equal Employment Opportunity Commission (hereinafter "EEOC"). After completing its cursory investigation, the EEOC dismissed Mr. Dela Rosa's charge and issued its no cause determination and right to sue letter on April 29, 1994.

Mr. Dela Rosa filed the underlying action on July 29, 1994. Thereafter, the harassment continued and increased and Mr. Dela Rosa tendered his resignation on August 12, 1994 as he was unable to take it any longer.

JURISDICTION IN THE DISTRICT COURT

The District Court of Arizona had subject matter jurisdiction in this case pursuant to 42 U.S.C. §1981, based upon the alleged

violations of Title VII of the 1964 Civil Right Act, as amended; and pursuant to 29 U.S.C. §633(b), based upon the alleged violations of the Age Discrimination in Employment Act.

ARGUMENT

Petitioner Lionel Dela Rosa brings this Petition for Writ of Certiorari to the United States Supreme Court for review of the United States Court of Appeals For the Ninth Circuit's decision affirming the District Court of Arizona's order granting summary judgment for Respondents and dismissing Mr. Dela Rosa's complaint in its entirety. The basis for this Writ is two-fold: The Ninth Circuit has entered a decision in conflict with the decisions of another United States court of appeal, and the United States Supreme Court; and has so far departed from the accepted and usual course of judicial proceeding and/or sanctioned such a departure by the District Court of Arizona, as to call for an exercise of this Court's supervisory power.

REASONS FOR GRANTING THE PETITION

While this Court has recently addressed the issues of what constitutes an abusive and harassing "hostile environment" with

respect to sexual harassment and sexual discrimination claims,[3] more guidance is needed at the appellate and trial court level as to what constitutes an abusive and harassing environment with respect to a racially hostile environment. This case would provide a means of giving that much needed guidance.

I. Whether the Petitioner, as the non-moving party, was entitled to have the District Court and the Ninth Circuit view the evidence and inferences that may have been drawn from the evidence set forth in connection with Respondent's motion for summary judgment filed in the District Court in the light most favorable to Petitioner and thus avoid summary judgment.

A court ruling on a motion for summary judgment should view the evidence and inferences that may be drawn from the evidence in the light most favorable to the ***nonmoving party.*** *United States v. Williams, 994 F.2d 646 (9th Cir. 1993)* (emphasis added). Thus, the Ninth Circuit in its *de novo* review of the district court's decision on summary judgment should have determined whether any genuine issues of material fact existed, and whether the lower court correctly applied the substantive law. *Id.*

However, in their opinions, neither the District Court, nor the

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3. *Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993).*

Ninth Circuit seemed to make any favorable inferences of the evidence to inure to the benefit of Mr. Dela Rosa. Quite the contrary, in their opinions concerning the appropriateness of summary judgment, whenever a genuine issue of material fact existed, the District Court and Ninth Circuit viewed the evidence in a light most favorable to the ***moving party*** - Respondent, as will be more fully discussed in connection with the issues set forth, *infra*.

II. Whether the Petitioner, who established in the District Court a prima facie case of hostile environment and disparate treatment race and age discrimination and submitted additional evidence showing he was subject to a disparaging racial joke, intentional physical injury in the form of a chemical burn, poisoning, workplace sabotage, and personal property damage created an inference of discriminatory animus sufficient to avoid summary judgment on his discrimination claims.

This Court in *Furnco Construction Corp. v. Waters*, held that when a plaintiff establishes a Title VII *prima facie* case of discrimination, although it is not the equivalent of a factual finding of discrimination, it is proof of actions taken by the employer from which discriminatory animus can be inferred because experience has proved that in the absence of any other explanation it is more likely than not those actions were based on impermissible considerations. 438 U.S. 567 at 569 (1978). This Court further elucidated its holding

in *Furnco* when it explained, we know from experience that more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting. *Id. at 577.* Thus, when all legitimate reasons for rejecting an applicant have been eliminated as possible reasons for the employer's actions, it is more likely than not the employer, who we generally assume acts only with some reason, based his decision on an impermissible consideration such as race. *Id.*

In the instant case, both the district court and Ninth Circuit failed to give any favorable inferences to Mr. Dela Rosa where material facts were in dispute, and instead chose to accept the Respondent's proffered non-discriminatory explanation and reject the proffered evidence of pretext provided by Mr. Dela Rosa. Despite the fact that the incidents of harassment against Mr. Dela Rosa continued unabated throughout a period of time encompassing over two years, the district Court and Ninth Circuit chose to accept the absurd and implausible explanation from Respondent that it was all done for the sake of "horseplay". While it is true that the only incident that can be unequivocally pointed to as overtly indicating a

racially discriminatory animus is the racially disparaging joke, it cannot be disputed that Mr. Dela Rosa, a member of a protected class, was the only "victim" in that work area singled out to be physically injured, humiliated, poisoned, his workbench sabotaged, and personal property damaged. The combination of the overt discriminatory animus in the racial joke combined with the fact that Respondent was singled out as the object of other harassing activities would arguably taint his entire treatment with the same discriminatory animus evident in the racial joke. The district court and Ninth Circuit, seem to be indicating that it is acceptable behavior to harass and discriminate against a member of a protected class as long as you don't expressly communicate to the individual you're harassing that you're doing so because he's a member of a protected class. This reasoning and rationale by the district court and Ninth Circuit undermines the very purpose of Title VII to prevent such discrimination and harassment in the workplace.

Not only is the reasoning and rationale of the district court and Ninth Circuit in disagreement with the very intent of Title VII to eradicate workplace discrimination, but it is contrary to this Court's

holding in *Harris v. Forklift Systems, Inc.*, where this Court stated:

> "But we can say that whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."

Harris v. Forklift Systems, Inc., 510 U.S. 17 at 23 (1993)

In this case, all of the *Harris* factors are present: the harassment Mr. Dela Rosa was subject to was frequent, severe, physically threatening, humiliating, offensive, and unreasonably interfered with his ability to perform his work. Yet, the district court and Ninth Circuit chose to ignore the discriminatory animus which was demonstrated by the totality of the circumstances and evidenced by the overt racially discriminatory animus inherent in the racially disparaging joke and the fact that Mr. Dela Rosa, a member of a protected class, was singled out to be the object of the harassment. In this way, the district court and the Ninth Circuit erred in it's analysis of whether their were undisputed material facts which would be sufficient to deny Respondent's motion for summary judgment.

III. **Whether the Petitioner, who established in the District Court that he took protected activity (by filing an internal grievance of race discrimination) and subsequently received an adverse performance appraisal was illegally retaliated against and therefore should survive summary judgment on his retaliation claim.**

Title VII prohibits an employer from retaliating against an employee for participating in an EEOC investigation or for opposing unlawful discrimination by the employer. *42 U.S.C. §2000e-3.* Here, Mr. Dela Rosa has continually asserted that in addition to his June 30, 1993 charge filed with the EEOC, Mr. Dela Rosa "opposed unlawful discrimination" by filing his internal grievance on June 1, 1993 where he alleged that he had been subject to racial and age discrimination. Both the district court and the Ninth Circuit have chosen to ignore this argument despite the fact that it has been present in Petitioner's response to the motion for summary judgment from the outset. Therefore, the decisions by the district court and Ninth Circuit are in error for this reason and should be reversed

Mr. Dela Rosa's filing an internal grievance wherein he raised the issue of racial discrimination, put the Respondent employer on notice and provided knowledge of the racial discrimination claim to Respondent Johston, Dela Rosa'a supervisor, who then retaliated

against Dela Rosa in his next evaluation which was prepared only weeks after the grievance. This is overt evidence of illegal retaliation and has been ignored by both the district court and Ninth Circuit.

IV. Whether the Petitioner was entitled to survive summary judgment on his state law claims in light of the facts and evidence submitted in connection with Respondents' motion for summary judgment.

Petitioner will concede that the viability of his state law claims are interrelated and dependent upon his discrimination claims, as they are pendent. Therefore, as the Court decides on the merits of Petitioner's discrimination and retaliation claims should determine the viability of his state law claims as well, and therefore, incorporates by this reference the arguments and authority set forth in those respective sections of this argument, *supra*.

CONCLUSION

Based on the arguments and authority set forth *supra*, Petitioner respectfully requests the Court grant this Petition for a Writ of Certiorari.

Respectfully submitted, this 15th day of May, 1998.



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October 1997

APPENDIX

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

LIONEL DELA ROSA, Plaintiff-Appellant, v. SCOTTSDALE MEMORIAL HEALTH SYSTEMS, INC, an Arizona corporation; MICHAEL JOHNSTON, husband; JANE DOE JOHNSTON, wife; TODD LYON, husband; JANE DOE LYON, wife; JOHN DOES I - X; JANE DOES I - X, Defendants-Appellees.	)	No. 96-17034 D. C. No. CV-94-01745-RGS MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona Roger G. Strand, District Judge, Presiding

Argued and Submitted November 4, 1997
San Francisco, California

Before: CHOY, ALARCON, and T.G. NELSON, Circuit Judges.

Lionel Dela Rosa appeals the district court's grant of summary judgment in favor of Scottsdale Memorial Health Systems, Inc.,

Michael Johnston, and Todd Lyon in Dela Rosa's action alleging federal claims of Title VII race discrimination, age discrimination, and retaliation, and several state law claims. We have jurisdiction under 28 U.S. C. § 1291. We affirm.

MOTION TO EXCEED PAGE LIMITS

We review the district court's compliance with local rules for an abuse of discretion. Hinton v. NMI Pac. Enters., 5 F. 3d 391, 394 (9th Cir. 1993). The district court did not abuse its discretion in granting Dela Rosa only three additional pages for his reply to the appellees' summary judgment motion. There is nothing substantive in Dela Rosa's initial twenty-four page reply that was subsequently excised from his eighteen-page reply, as he simply changed the font in order to reduce the number of pages.

SUMMARY JUDGMENT

We review a grant of summary judgment de novo. Forsyth v. Humana, Inc., 114 F. 3d 1467, 1474 (9th Cir. 1997), petition for cert. filed, 66 U.S.L.W. 3204 (U.S. Sept. 17, 1997) (No. 97-504). Summary judgment for the appellees on all of Dela Rosa's claims was appropriate.

A. Hostile Racial Environment[1]

Our sexual harassment cases provide guidance for determining the required elements for an analogous racial harassment claim. The elements necessary to create a sexual harassment claim are contained in Steiner V. Showboat Operating Co., 25 F. 3d 1459 (9th Cir. 1994):

> In order to survive Showboat's summary judgment motion, Steiner must show that there are genuine factual disputes as to (1) whether a reasonable woman would find that [her supervisor's] conduct was "sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment," and (2) whether Showboat, once apprised of [the supervisor's] behavior, failed to take adequate remedial and disciplinary action.

Id. At 1462-63 (quoting Ellison v. Brady, 924 F.2d 872, 879, 881-83 (9th Cir. 1991)). Put another way, we have held that to prove the existence of a hostile work environment in the context of a sexual harassment claim, the employee must show that "1) she was subjected to verbal or physical conduct of a sexual nature, 2) this conduct was unwelcome, and 3) the conduct was sufficiently severe or pervasive to

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[1] A liberal construction of Dela Rosa's complaint would divide his Title VII discrimination claims into separate claims of a hostile working environment and disparate treatment. Because the district court and the parties divide them this way, we will follow the same structure inj this memorandum disposition.

alter the conditions of the victim's employment and create an abusive working environment." Fuller v. City of Oakland, 47 F.3d 1522, 1527 (9th Cir. 1995) (quotation and citations omitted). By substituting "racial" at the appropriate places, these cases adequately describe the elements necessary to create an analogue racial harassment claim.

The problem with Dela Rosa's racial harassment claim is that almost all of the incidents he cites as creating a hostile work environment were not racial in nature. The only incident that was racially charged by its very nature was the telling of the racial joke.[2] The other incidents were not racial in nature and Dela Rosa has offered no evidence that nay other incident was motivated by racial animus.

B. Disparate Treatment

Dela Rosa alleges that he was discriminated against on the basis of either his race or his age. The required elements to make out

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[2] On appeal, Dela Rosa points to a second racial incident where Johnston allegedly referred to the dialysis department as the "land of white supremacy," citing a single page from Dela Rosa's deposition (Appellant's opening Br. at 15). We have reviewed the entire district court record, and it is clear that this evidence was not submitted to the district court for its review of the appellees' summary judgment motion. Because this evidence was not considered by the district court, we will not consider it on appeal.

a prima facie case on either claim are substantially the same. For race discrimination claims, the elements are taken from the Supreme Court's opinion in McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802 (1973), and consist of the following:

1. that the plaintiff belongs to a class protected by Title VII;
2. that the plaintiff applied and was qualified for a job for which the employer was seeking applicants;
3. that, despite being qualified, the plaintiff was rejected [the "adverse employment action"]; and
4. that, after the plaintiff's rejection, the position remained open and the employer continued to seek applicants from persons of comparable qualifications.

Lowe V. City of Monrovia, 775 F.2d 998, 1005 (9th Cir. 1985) (citing McDonnell Douglas Corp., 411 .S. at 802). For age discrimination claims, the employee, to establish a prima facie case, must show that he:

> (1) was a member of the protected class [40-70]; (2) was performing his job in a satisfactory manner; (3) was discharged {or subject to an "adverse employment action"]; and (4) was replaced by a substantially younger employee with equal or inferior qualifications.

Rose v. Wells Fargo & Co., 902 F.2d 11417 (9th Cir. 1990).

We will assume, without deciding, that Dela Rosa has made out

a prima facie case for disparate treatment.[3] As a result, Dela Rosa has raised a presumption of discrimination by the employer. Furnco Constr. Corp. v. Waters, 428 U.S. 567, 577 (1978). The burden then shifts to the employer to "rebut the presumption of discrimination by articulating a nondiscriminatory reason" for issuing the poor performance evaluation. Lowe, 775 F.2d at 1007. The employer need only 'set forth a legally sufficient explanation" for the poor evaluation. Id. See also Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994) (discussing same standard in age discrimination case).

In this case, the appellees sufficiently rebut the presumption of discrimination with evidence demonstrating that Dela Rosa was not performing certain aspects of his job satisfactorily, particularly with regard to his interpersonal skills.

After the employer has rebutted the presumption of discrimination, the burden shifts back to the employee, who can only defeat summary judgment by raising a genuine factual question as to

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[3] It is questionable whether a negative performance evaluation, standing alone, constitutes an adverse employment action. See Steiner, 25 F.3d at 1465.

whether 'the proffered justification is merely a pretext for discrimination." Furnco, 438 U.S. at 578. See also Lowe, 775 F.2d at 1008 (the rebuttal "shift[s] the burden back to the plaintiff to raise a genuine factual question as to whether the proffered reason is pretextual"). In order to satisfy this burden, "the plaintiff need not necessarily offer evidence beyond that offered to establish a prima facie case." Lowe, 775 F.2d at 1008.

Dela Rosa cannot merely rely on bare allegations of discrimination to survive summary judgment. The question before us is whether "a rational trier of fact could, on all the evidence, find that the employer's action was taken for impermissibly discriminatory reasons." Wallis, 26 F.3d at 889. "In response to the defendant's offer of nondiscriminatory reasons, the plaintiff must produce 'specific, substantial evidence of pretext.'" Id. At 890 (quoting Steckl v. Motorola Inc., 703 F.2d 392, 393 (9th Cir. 1983)) (emphasis added). Evidence of pretext can be offered either directly or indirectly. Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991). Dela Rosa does neither.

Dela Rosa baldly asserts that it is "suspicious at best" and

"absurd" to believe that Johnston's response to the harassing incidents was not motivated by a discriminatory intent (Appellant's Opening Br. At 22). However, Dela Rosa needs to prove that the poor employment evaluation (the only employment decision that could qualify as an adverse action) was the product of a discriminatory intent. Dela Rosa's extensive argument that he was technically proficient at his job does not help him satisfy this burden since the appellees have never disputed Dela Rosa's technical proficiency and all of the relevant evidence indicates that Johnston himself never doubted this fact.[4] Dela Rosa's bare assertion that he was singled out for blame in the harassing incidents that resulted in the tense work environment falls flat in the face of the hospital's evidence that all employees were repeatedly

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4 In the summary letter accompanying the allegedly poor employment evaluation, Johnston wrote:

> Overall the quality and quantity of work you have performed has been solid and reliable. You have continuously demonstrated you possess an excellent knowledge and equipment background. You have also demonstrated very good time management.

The only reasonable interpretation of this summary is that Johnston believed that Dela Rosa was technically proficient, even skilled, in the performance of his duties.

warned that such conduct was not acceptable. Johnston's identification of Dela Rosa's need to improve his relationships with coworkers and others did not first arise in the allegedly poor performance evaluation. Even before his transfer to the North Hospital, his previous supervisor had identified "communication skills" and "relationships with others" as areas where Dela Rosa's performance needed improvement.

Dela Rosa cannot survive summary judgment by challenging the credibility of Johnston or the hospital's other witnesses without offering substantial factual evidence of a discriminatory motivation. Lindahl, 930 F.2d at 1437-38; Steckl, 703 F.2d at 393. As in Wallis, Dela Rosa 'has simply showed that an adverse employment decision was made under conditions that permitted him to invoke a McDonnell Douglas type of presumption of unlawful discrimination. That evidence . . . is not enough now that [the Hospital] has offered a nondiscriminatory explanation, and nothing in [Dela Rosa's] evidence controverts it." Wallis, 26 F.3d at 892.

C. Retaliation

"In a retaliation case, the burden shifting scheme is much the same as that in an age discrimination case." Nidds v. Schindler

Elevator Corp., 113 F.3d 912, 919 (9th Cir. 1996) (citation omitted), cert. denied, No. 97-364, 1997 WL 561754 (U.S. Nov. 3, 1997). Proof of a prima facie case of unlawful retaliation requires Dela Rosa to provide evidence that:

(1) he was engaged in a protected activity;

(2) he was thereafter subjected by his employer to an adverse employment action; and

(3) a causal link exists between the protected activity and the adverse employment action.

Wallis, 26 F.3d at 891.

The problem with Dela Rosa's retaliation claim arises in his proof of the third element of the prima facie case. Johnston prepared the allegedly poor performance evaluation on June 25, 1993. Dela Rosa filed his EEOC charges on June 30, 1993. Because the protected activity did not occur until after the adverse employment action, the retaliation claim fails and summary judgment for the appellees was appropriate.[5]

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[5] We will not consider Dela Rosa's untimely argument that the internal grievance he filed with the hospital on June 1, 1993, constitutes the protected activity. This theory is new on appeal, is not contained in Dela Rosa's complaint, and was not raised before the district court.

D. The State Claims

Summary judgment for the appellees was also appropriate on Dela Rosa's state claims. As we concluded above, Dela Rosa has failed to provide evidence that he was subject to unlawful discrimination or an environment of racial harassment, that any of the appellees acted with a discriminatory intent, or that the hospital's remedial response to Dela Rosa's complaints was inadequate or pretextual to a discriminatory motivation. Because all of Dela Rosa's state claims require evidence of one or more of these elements, the district court properly concluded that none of them survive summary judgment.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

LIONEL DELA ROSA, Plaintiff, vs. SCOTTSDALE MEMORIAL HEALTH SYSTEMS, INC., et al., Defendants	)	CIV 94-1745-PHX-RGS ORDER

Factual Background

Plaintiff Lionel Dela Rosa was employed as a Biomedical Engineering Technician II ("BMET") with Scottsdale Memorial Health Systems, Inc. from April 9, 1990 to August 10, 1994, the date he terminated his employment. Plaintiff claims that he has been discriminated against, retaliated against, and constructively discharged because of his national origin, Hispanic, and his age, over 40.

Plaintiff specifically alleges various incidents as supporting his claim of disparate treatment under Title VII. Defendants assert that plaintiff had a continuing pattern of performance problems from

1990 including numerous complaints by coworkers of plaintiff's disruptive effect on his co-worker and their work environment, that there is no evidence of unlawful discriminatory animus, and with respect to the alleged incidents, action in accordance with hospital policy was taken as soon as possible to correct the situation.

Plaintiff asserts claims for: 1. Hostile environment based on age and race; 2. Disparate treatment based on age and race; 3. Retaliation; 4. Breach of contract; 5. Breach of covenant of good faith and fair dealing; 6. Battery; 7. Interference with contract; 8. Negligent supervision; 9. Intentional infliction of emotional distress; and 10. Constructive discharge. Defendants seek summary judgment on all plaintiff's claims.

Summary Judgment Standard

In evaluating a summary judgment motion, the inquiry is whether, with respect to any dispositive issue, the pleading and supporting materials show there is no genuine issue of material fact, and if not, whether viewing the evidence and inferences which may be drawn therefrom in a light most favorable to the non-moving party, the moving party is entitled to judgment as a matter of law.

Fed. R. Civ. P. 56; California Architectural Building Products, Inc. V. Franciscan Ceramics, Inc., 818 F.2d 1466, 122468 (9th Cir. 1987), cert. den., 484 U.S. 1006, 108 S. Ct. 698 (1988).

The moving party must produce evidence establishing the absence of a genuine issue of material fact. Celotex Corp. V. Catrett, 477 U.S. 317, 106 S. Ct. 2548, 2553 (1986). The absence of a genuine issue of material fact may be demonstrated by pointing out to the district court that "there is an absence of evidence to support the nonmoving party's case" on an issue where the nonmoving party bears the burden of proof. Id. at 2554. Moreover, at the summary judgment stage, the court's function is not to weigh the evidence and determine the truth of the matter, but merely to determine whether there is a genuine issue for trial. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 2511 (1986).

If the non-moving party will bear the burden of proof at trial as to any element essential to its case, that party can withstand a motion for summary judgment only by making a showing sufficient to establish a genuine issue of fact regarding that element and a showing that the dispute properly may be resolved only by the fact

finder because it could reasonably be resolved in favor of either party. Celotex Corp., 477 U.S. at 321, 106 S. Ct. At 2552-53; Anderson, 477 U. S. at 249, 106 S. Ct. at 2511.

In order to make such a showing, the party opposing the motion must present specific facts in support of its contentions and must support these facts by proper evidentiary material, which when coupled with undisputed background and contextual facts, show that the fact-finder could reasonably find in his favor; the non-moving party cannot merely rest on his pleadings. Fed. R. Civ. P. 56 (e). See Also T.W. Elec. Service. Inc. V. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 631 (9th Cir. 1987) (citations omitted). Moreover, where the factual context makes the non-moving party's claim implausible, that party must come forward with evidence even more persuasive than would otherwise be necessary to show that there is a genuine issue for trial. California Building Products, 818 F.2d at 1468 (citing Matsushita Elec. Indus. Co. V. Zenith Radio Corp., 475 U.S. 574, 586, 106 S. Ct. 1348, 1356 (1986).

Title VII

The Unites States Supreme Court in St Mary's Honor Center

V. Hicks, 113 S. Ct. 2742 (1993), clarified the order and allocation of proof required to show discrimination under Title VII. First a plaintiff must show a prima facie case of discrimination by showing that (1) he belongs to a protected group; (2) he applied and qualified for a job in which the employer was seeking applicants; (3) despite his qualifications, he was rejected; and (4) the employer hired someone else outside of the protected group. Id. At 2747 (citing McDonnell Douglas Corp. V. Green, 411 U.S. 792, 802 (1973); see also Hughes v. Derwinski, 967 F.2d 1168, 1171 (1992). Second, upon proper showing of a prima facie case, the employer must rebut by producing evidence that the adverse employment action was for a legitimate non-discriminatory reason. Hicks, 113 U.S. at 2747. The employer must clearly set forth reasons for its actions, "which if believed by the trier of fact would support a finding that unlawful discrimination was not the cause of the employment action." Id. Third, if the employer meet its burden of production, plaintiff must prove that the employer's articulated reason was a pretext for intentional discrimination in violation of Title VII. Id. Thus, plaintiff must show both that the reason given is false and that discrimination

is the real reason. Id. At 2752. Summary judgment is appropriate where a plaintiff's evidence to refute a defendant's legitimate explanation is totally lacking, even though the plaintiff may have established a prima facie case. Wallis v. J.R. Simplot Co., 26 F.3d 885, 890 (9th Cir. 1994). In other words, plaintiff must produce a genuine issue of material fact as to pretext to avoid summary judgment. Id. (Citing Steckly v. Motorola Inc., 703 F.2d 392, 393 (9th Cir. 1983).

1. Hostile Environment Claim

In order to prevail on a hostile environment claim, plaintiff must establish that he was subjected to a hostile environment sufficiently severe and pervasive to alter his working conditions and that the hostility was based on his age or national origin. Plaintiff's Complaint sets forth several incidents as contributing to the alleged hostile environment.

Plaintiff claims that a coworker, defendant Lyon, sprayed plaintiff on the back with Freon from an aerosol can. Two other coworkers, neither of whom was over 40 or Hispanic, were sprayed with the Freon at the same time as plaintiff was by Lyon.

Plaintiff's bottle of Simple Green, a cleaning agent, was stuck to his work shelf. When plaintiff attempted to pick up the bottle, it broke and the Simple green spilled on plaintiff. It remains uncertain whether the bottle was actually glued to the shelf. Further, a culprit for the alleged incident has never been named by anyone. Defendant Johnston, however, cleaned the area himself and instructed the work group to refrain from horseplay if the gluing had been intentional. Defendants also submit an affidavit that states that similar practical jokes occur in the work areas from time to time but that the hospital acts to keep such occurrences low.

Plaintiff complains that in October 1992, his coffee was tampered with but that he did not report the incident until July 1993 to the hospital. Neither a substance nor a perpetrator has been identified.

Plaintiff contends that someone replaced shipping caps on a new pump he was installing which prevented the pumps from properly operating. When it was discovered that the caps were still in place, Johnson (plaintiff's supervisor) asked Lyon (plaintiff's coworker), "What do you think about an individual who leaves the

caps on a pump?" to which Lyon replied "I think he's a stupid idiot." This incident was never reported to the hospital. Although the comment may be considered inappropriate, it does not evidence any racial or age discriminatory animus.

A nonparty coworker told a joke about a Mexican, a Russian and an Arizona cowboy after asking if anyone wanted to hear such a joke. Plaintiff's coworker, Diane Barraza-Mooney is also a Mexican-American and did not raise an object to the telling of the joke. Plaintiff, although present at the time of the inquiry, did not object to the telling of the joke. Plaintiff did not state that he would be offended and in fact, did not report the incident until June 1993 during a grievance process. Once the joke incident was reported to hospital authorities, the work group was instructed that such jokes were inappropriate.

Plaintiff contends that his workbench brackets were tampered with making the bench loose. Nonparty coworker Dianne Barraza-Mooney explained to Johnston and plaintiff that she had accidentally bumped the bench with a portable piece of equipment. Plaintiff initially disbelieved Barraza-Mooney and repeatedly struck his

workbench with hospital equipment in order to show that the brackets could not be loosened the way Barraza-Mooney explained.

Plaintiff's recitation in incidents fails to demonstrate that any of the events was motivated by plaintiff's national origin or age. The most plaintiff can do is state that he believes the incidents were motivated by discrimination. If the ethnic joke incident was repeated on several occasions, that situation could possibly form the basis of a hostile environment claim; however, a single incident will not support plaintiffs claim particularly when the employer makes an effort to ensure that such an incident will not recur once the incident is brought to the employer's attention. Thus defendants are entitled to summary judgment on plaintiff's hostile environment claim.

2. Disparate Treatment Based on Age and National Origin

Disparate treatment requires a showing that the employer treats some people less favorably than others because of their age or national origin. Rose v. Wells Fargo & Co., 902 F.2d 502, 506 (9th Cir. 1990). The disparate treatment theory involves intentional discrimination. A *prima facie* case of intentional discrimination

based on race, set, age or national origin "may be based either on a presumption arising from the factors such as those set for [sic] in McDonnell Douglas Corp. V. Green . . . or by more direct evidence of discriminatory intent." Wallis v. J.R. Simplot Co., 26 F.3d 885, 889 (9th Cir. 1994). Under McDonnell Douglas, a plaintiff must show: (1) membership in a protected class; (2) that he or she applied for and was qualified for a job; (3) that an employment decision was made despite these qualifications; and (4) the position remained open and the employer continued to consider applicants with comparable qualifications. McDonnell Douglas, 411 U.S. 802.

Plaintiff contends that he has made a *prima facie* case of age and national origin discrimination. Defendants argue that plaintiff was not performing satisfactorily. Assuming plaintiff has made a *prima facie* case, the Ninth Circuit has held that:

> in deciding whether an issue of fact has been created about the credibility of the employer's nondiscriminatory reasons, the district court must look at the evidence supporting the *prima facie* case, as well as the other evidence offered by the plaintiff to rebut the employer's offered reasons. And, in those cases where the *prima facie* case consists of no more than the minimum necessary to create a presumption of discrimination under *McDonnell Douglas*, plaintiff has failed to rase a triable issue of fact.

Wallis, 26 F.3d at 890 (quoting Sischo-Nonejad v. Merced Community College Dist., 934 F.2d 1104, 1111 (9th Cir. 1991)). Moreover, "a plaintiff cannon defeat summary judgment simply by making out a *prima facie* case." Lindahl v. Air France, 930 F.2d 1434, 1437 (9th Cir. 1991). Rather, plaintiff mus produce "specific, substantial evidence of pretext." Steel v. Motorola, 703 F.2d 392 (9th Cir. 1983).

Here, plaintiff scarcely establishes a *prima facie* case and certainly does not provide specific, substantial evidence of pretext. Although plaintiff asserts that he believes that his age and national origin caused certain events to occur, plaintiff has offered nothing more than mere assertions that defendants acted with discriminatory intent. Such assertions are insufficient and without substantial factual evidence to preclude summary judgment.

3. Retaliation

In order to establish a prima facie case of retaliation, plaintiff must show that he engaged in a protected activity, the employer thereafter subjected him to adverse employment action and there was a causal link between the two events. Jordan v. Clark, 847 F.2d

1368, 1376 (9th Cir. 1988), cert. denied, 488 U.S. 1006 (1989). To show the requisite causal link, the plaintiff must "present evidence sufficient to raise the inferences that her protected activity was the likely reason for the adverse action." Cohen v. Meyer, 686 F.2d 793, 796 (9th Cir. 1982). Further, "[e]ssential to a causal link is evidence that the employer was aware that the plaintiff had engaged in the protected activity." Id.

Here, plaintiff claims he received a low performance evaluation from his supervisor, defendant Johnston, in retaliation for having filed an EEOC charge alleging age and race discrimination on June 30, 1993. However, it is undisputed that Johnston prepared plaintiff's evaluation weeks before Johnston presented it to plaintiff on July 9, 1993, three days before Johnston knew that plaintiff filed the initial EEOC charge. Thus, there is no evidence of any causal link between plaintiff's protected activity and the event he alleges as an adverse employment action. Accordingly, defendants' motion for summary judgment on plaintiff's retaliation claims will be granted.

4. Breach of Contract

Plaintiff alleges that the Hospital's policies and procedures

against discrimination, harassment and retaliation constitute an implied contract which the hospital breached by failing " to take corrective action once they had actual or inquiry knowledge of the ongoing course of harassment and discrimination against Plaintiff." Amended Complain, ¶70. The Hospital's Staff Member Guidebook provided to plaintiff states on page 1: "This information is not a contract, the Scottsdale Memorial reserves the right to amend, change or discontinue, the policies, practices and benefits described at any time." Defendants' SOF, ¶3. Also on page 5 of the Staff Member Guidebook, there is a similar disclaimer concerning eh Equal Employment Opportunity policy and the Administrative Policy & Procedure Manual: "Neither this summary, nor the Administrative Policy & Procedure Manual are to be considered an employment contract." Defendants' SOF, ¶3.

Employment is presumed to be "at-will" and that employment can be terminated at any time by either the employee or employer without cause in the absence of a definite term of employment. Wagenseller v. Scottsdale Memorial Hospital, 710 P.2d 1025, 1030-31 (Ariz. 1985); Worth v. City of Flagstaff, 808 P.2d

297, 301 (Ariz. App. 1990). Although plaintiff admits that he had no written contract or definite term of employment, he contends that he had an implied-in-fact contract.

The implied-in-fact contract exception required proof of an implied promise of continued employment absent just cause for termination and may be established by oral representations, personnel manual or memoranda. Id. Where policies or handbooks, however, contain clear disclaimers or specific language regarding an employees's at-will status, there can be no claim or implied employment contract. Chambers v. Valley National Bank of Arizona, 721 F. Supp. 1128 (D. Ariz. 1988); Thomas v. Garrett Corp., 744 F. Supp. 199 (D. Ariz. 1989, aff'd 904 F.2d 41.

Plaintiff contends that his at-will status was modified so that he had an implied-in-fact contract based on certain EEO/Affirmative Action policies that provide that defendant will not discriminate on the basis or race, age or sex as found in the EEO section in the Staff Member Guidebook and the EEO policy in the Administrative Policy and procedure Handbook. An employer's general commitment to EEO in the policy manuals does not create an

exception to at-will employment. Lofton v. Wyeth Laboratories, 643 F. Supp. 170, 174 (E.D. Pa. 1986) ("To liberally allow statements on equal employment opportunity in employment manual to create contractual obligations would invite employers to become less avid in publicizing and implementing equal employment policies"). A recent Arizona Court of Appeals decision rejected an employee's breach of contract claims based on similar disclaimers in an employee handbook. Duncan v. St. Joseph's Hospital and Medical Center, 903 P.2d 1107 (Ariz. Ct. App. 1995). Plaintiff has not me his burden of showing a genuine issue of material fact with respect to an essential element of his claim, i.e., an impled contract. Thus summary judgment in defendants' favor is required.

5. Breach of Covenant of Good Faith and Fair Dealing

Arizona courts recognize an implied covenant of good faith and fair dealing in the employment-at-will contract. Wagenseller, 710 P.2d at 1040. The covenant of good faith and fair dealing "protects the right of the parties to an agreement to receive the benefits of the agreement that they have entered into." Id. The covenant protects an employee from a discharge based on an

employer's desire to avoid the payment of benefits already earned by the employee. Id. Here, there is no evidence that plaintiff failed to receive the benefits that were a part of his employment relationship with defendants.

6. Battery

Defendants contend that plaintiff's batter claims based on the Freon incident is barred by the two-year statute of limitations in A.R.S. § 12-542 (1992). Defendants also correctly note that plaintiff is unable to produce any evidence that anyone placed anything in plaintiff's coffee. Plaintiff does not address this claims in his response to the motion for summary judgment; therefore, plaintiff has abandoned his battery claim.

7. Tortious Interference with Contract

The Wagenseller court set forth the elements of the tort of interference with contract:

(1) The existence of a valid contractual relationship or business expectancy;

(2) knowledge of the relationship or expectancy on the part of the interferer;

(3) intentional interference inducing or causing a breach or termination of the relationship or expectancy; and

(4) resultant damage to the party whose relationship or expectancy has been disrupted.

Wagenseller. 710 P.2d at 1041, (citing Antwerp Diamond Exchange v. Better Business Bureau of Maricopa County, 637 P.2d 730, 733 (1981) (quoting Calbom v. Knudtson, 65 Wash. 2d 157, 162-63, 396 P.2d 148, 153-54 (1964). Here, plaintiff argues that he has made a *prima facie* case of interference with contract. However, at the summary judgment state, plaintiff must do more than present a *prima facie* case. Plaintiff has not presented any evidence of an implied-in-fact contract or intent on the part of defendants Lyon and Johnston to disrupt plaintiff's employment agreement. Nor has any evidence been presented that defendants induced a breach of the employment relationship between plaintiff and his employer. In the absence of evidence to support an essential element of plaintiff's claim, summary judgment is appropriate.

8. Negligent Supervision

Defendants contend that Arizona courts have not recognized the tort of negligent supervision in the context of one employee suing an employer for the actions of co-employees. Negligent supervision in Arizona requires, however, that plaintiff prove, as an essential

element of the case, the commission of an underlying tort. States that do recognize negligent supervision in the co-employee context require physical injury to the plaintiff that was caused by the employer's negligence.

"The general rule concerning negligent . . . supervision of employees is found in Restatement (Second) of Agency, §213:

> A person conducting an activity through servants or other agents is subject to liability for harm resulting from his conduct if he is negligent or reckless:
>
> (a) in giving improper or ambiguous orders of (sic) in failing to make proper regulations; or
> (b) in the employment of improper persons or instrumentalities in work involving risk of harm to others;
> © in the supervision of the activity; or
> (d) in permitting, or failing to prevent, negligent or other tortious conduct by persons, whether or not his servants or agents, upon premises or with instrumentalities under his control.

Comment d to the Restatement (Second) of Agency further explains that "[l]iability results under the rule stated in this Section, not because of the relation of the parties, but because the employer antecedently had reason to believe than an undue risk of harm would exist because of the employment. The employer is subject to liability only for such harm as is within the risk.

Plaintiff's Amended Complaint states that "Defendant (Scottsdale memorial) breached its duty to Plaintiff when it allowed him to be intentionally injured by defendant Lyon and further harassed and discriminated against by defendants Lyon and Johnson, which was foreseeable, and then took no remedial action." Amended complaint ¶95. Although plaintiff worked for Scottsdale Memorial from 1990, the incident with Lyon that plaintiff complains of occurred, spraying of Freon, on April 21, 1992. Plaintiff has not offered any evidence of prior notification of such incidents to the hospital. Once the employer was made aware of the Freon incident, Lyons was made to apologize to plaintiff and an incident memo was placed in Lyon's employment file. Here, as in Kassman v. Busfield Enterprises, 639 P.2d 353 (Ariz. Ct. Appl. 1981), plaintiff has not offered evidence of conduct prior to the event of plaintiff's alleged Freon injury. Thus plaintiff has not met his burden of showing notice to the employer of potential negligence by plaintiff's coworker.

With respect to alleged acts of harassment and discrimination by defendants Lyon and Johnston, the Court has found the plaintiff has not presented evidence of harassment based on discriminatory

intent. In the absence of a tort related to discrimination, plaintiff's claim of negligent supervision must fail. Mulhern v. City of Scottsdale, 799 P.2d 15, 18 (Ariz. Ct. App. 1990).

9. Intentional Infliction of Emotion Distress

To prevail on a claim intentional infliction of emotional distress, plaintiff must show: (1) that defendants' conduct could be characterized as "extreme and outrageous"; (2) that defendants either intended to cause or recklessly disregarded the near certainty that emotional distress would result from their conduct; (3) that defendants' conduct actually cause severe emotional distress. Lucchesi v. Frederic N. Stimmell M.D., Ltd., 149 Ariz.76, 78-79, 716 P.2d 1013, 1015-16 (1986). Even if the second and third elements are present, the trial court must, on the first element, make a preliminary determination whether the conduct may be considered so outrageous and extreme so as to permit recovery. Cluff v. Farmers Ins. Exch., 10 Ariz. App. 560, 562, 460 P.2d 666, 668 (1969); see also Restatement (Second) of Torts § 46. That issue may only go to the jury where "reasonable minds may differ." Restatement, supra. Even if a defendant's conduct is unjustifiable, it does not necessarily

rise to the level of "atrocious" and "beyond all possible bounds of decency" that would cause an average member of the community to believe it was "outrageous." Ford v. Revlon, Inc., 153 Ariz. 38, 43, 734 P.2d 580, 585 (1987); Lucchesi, 149 Ariz. at 78, 716 P.2d at 1015; see also Watts v. Golden Age Nursing Home, 127 Ariz. 255, 619 P.2d 1032 (1980) (unjustifiable delay in failing to notify wife of husband's terminal illness was not outrageous); Duhammel v. Star, 133 Ariz. 558, 653 P.2d 15 (App.1982) (false accusations against police officer not outrageous conduct justifying claim for emotional distress).

Having reviewed the record presented in this matter, the Court finds as a matter of law that plaintiff did not provide evidence of outrageous and extreme conduct sufficient to survive a motion for summary judgment.

10. Constructive Discharge

Plaintiff contends that his resignation was actually a constructive discharge in violation of public policy, i.e., that plaintiff was forced to quit by intolerable conditions. "A constructive discharge occurs when, looking at the totality of circumstances, 'a

reasonable person in [the employee's] position would have felt that he was forced to quit because of intolerable and discriminatory working conditions.'" Watson v. Nationwide Ins. Co., 823 F.2d 360, 361 (9th Cir. 1987) (quoting Satterwhite v. Smith, 744 F.2d 1380, 1381 (9th Cir. 1984)). Although the Watson court noted that the determination whether conditions were so intolerable and discriminatory as to justify a reasonable employee's decision to resign was generally left to the trier of fact, the court stated that "in general, a single isolated instance of employment discrimination is insufficient as a matter of law of support a finding of constructive discharge." Watson, 823 F.2d at 361. The court also stated that "a plaintiff alleging a constructive discharge must show some 'aggravating factors, ' such as a 'continuous patter of discriminatory treatment.'" Id. (Quoting Satterwhite, 744 F.2d at 1382). Here , plaintiff has not presented any evidence that supports his allegation of age or requisite showing of a "continuous patter of discriminatory treatment." Consequently, there is no evidence that plaintiff was subjected to an unlawfully discriminatory work environment so intolerable that a reasonable person would have been forced to resign.

Based on the foregoing, IT IS ORDERED granting defendants' motion for summary judgment. (doc. #30).

FURTHER ORDERED directing the Clerk of the Court to enter judgment in accordance with this Order.

DATED this 20th day of September, 1996.

HONORABLE ROGER G. STRAND
U.S. DISTRICT COURT JUDGE